

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) NO. CR 04-0548 RB
JOHN ANTHONY ORTEGA,)
Defendant.)

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on Defendant's (Mr. Ortega's) Motion for Reduction of Sentence Under Title 18 United States Code § 3582(c), (Doc. 37), filed on November 20, 2009, based on the anticipated Fairness in Sentencing Act of 2009 and H.R. 3245. On January 10, 2007, Plaintiff filed a response in opposition to this motion. (Doc. 42.) Having considered the arguments of the parties, relevant law, and being otherwise fully informed, the Court finds that this motion must be **DENIED**.

I. Background.

On February 28, 2005, Mr. Ortega pled guilty to a two-count indictment, charging him with distribution of crack cocaine within 1000 feet of a school, (Count I), and distribution of crack cocaine, (Count II). Pursuant to Fed.R.Crim.P. 11(c)(1)(C), the plea agreement stipulated that Mr. Ortega would be sentenced at an offense level 25 and receive a 100 months term of imprisonment, the low end of the applicable guideline sentencing range of 100 to 125 months. The Court accepted the plea agreement and sentenced Mr. Ortega to a term of incarceration of 100 months.

On December 19, 2007, Mr. Ortega filed a motion under 18 U.S.C. § 3582(c)(2) and

Amendment 706 of the Sentencing Guidelines, which reduced the disparity between the penalties for crack cocaine and those for powder cocaine. That motion was denied on September 11, 2008, as Mr. Ortega was ineligible for such a reduction because his sentence was based on a valid plea agreement, pursuant to Fed.R.Crim.P. 11(c)(1)(C), and not on drug quantity. (Doc. 35.)

II. Discussion.

Mr. Ortega now requests a reduction in his sentence pursuant to the “Fairness in Sentencing Act of 2009” and H.R. 3245. Mr. Ortega also points out that United States Attorney General Eric Holder has called for a complete elimination of the crack cocaine disparity.

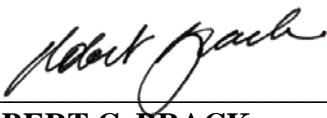
As I observed in my Memorandum Opinion and Order of September 11, 2008, (Doc. 35), this Court is generally prohibited from reducing a sentence of imprisonment after expiration of the time limits set forth in Fed. R. Crim. P. 35, and may modify a previously imposed sentence only pursuant to statutory authorization. (Doc. 35.) However, I further observed that 18 U.S.C. § 3582(c)(2) provides statutory authorization for this Court to reduce a term of imprisonment “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2).

Mr. Ortega acknowledges that the “Fairness in Sentencing Act of 2009” and H.R. 3245 bill have yet to become law. Indeed, Mr. Ortega is correct in this respect. “On July 29, 2009, the House Judiciary Committee approved H.R. 3245, entitled ‘The Fairness in Cocaine Sentencing Act of 2009.’ The bill, if enacted, will remove references to ‘cocaine base’ from the U.S. Code, effectively leaving a 1-to-1 ratio.” *United States v. Medina*, 2009 WL 2948325 (S.D. Cal. 2009) (citing H.R. 3245, 111th Cong. (2009).); see also *United States v. Brooks*, 2009 WL 4927883 (W.D. Pa. 2009) (“Congress has not passed a law regarding the sentencing differences between crack and powder cocaine.”)

The “Fairness in Sentencing Act of 2009” and H.R. 3245 have not been enacted into law. The Court cannot predict when, or if, this legislation will pass. Moreover, if H.R. 3245, or similar legislation, does become law, it is unclear whether it would apply retroactively. *United States v. Brown*, 2009 WL 3837630 (D. Me. 2009) (“[P]ending legislation does not provide the Court the authority to modify the Defendant's previously imposed sentence.”). Accordingly, the Court is without authority to modify Defendant's sentence.

THEREFORE,

IT IS ORDERED that Defendant's Motion for Reduction of Sentence Under 18 U.S.C. § 3582(c), (Doc. 37), filed on November 20, 2009, is **DENIED**.



ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE